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Government Liability - Federal Tort Claims Act - Intentional Tort Exception

Gregg Guthrie

GOVERNMENT LIABILITY—FEDERAL TORT CLAIMS ACT—INTENTIONAL TORT EXCEPTION—The United States Supreme Court has held that an assault and battery committed by an off-duty government employee is not barred by the intentional tort exception of the Federal Tort Claims Act where other government employees are negligent in failing to prevent the assault and battery.

Sheridan v. United States, 108 S. Ct. 2449 (1988).

On February 6, 1982, a naval medical aide named Carr finished his shift at the Bethesda Naval Hospital and thereafter consumed a large quantity of various alcoholic beverages.[1] He packed a rifle and some ammunition into a uniform bag and left his quarters.[2] Later that evening, three naval corpsmen found Carr in an inebriated condition lying face down on the floor of a hospital building.[3] The corpsmen attempted to transport Carr to the emergency room when he struggled and broke free, grabbing his bag and exposing part of the rifle.[4] The corpsmen, startled at the sight of a rifle, dissipated, neither taking further action to subdue Carr nor alerting the appropriate authorities of Carr's dangerous propensities.[5] Some time later, Carr fired several shots into an automobile being driven near the Bethesda Naval Hospital by the Sheridans, causing physical injury to Mrs. Sheridan and property damage to their automobile.[6]

The Sheridans commenced an action in a federal district court[7] against the United States Government under the Federal Torts Claims Act (FTCA).[8] They alleged that their injuries were the re-

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1. Sheridan v. United States, 108 S. Ct. 2449, 2452 (1988).

2. *Id.* Apparently Carr's roommate was aware that Carr possessed a firearm against Navy regulations. Id. at 2455 n.5.

3. *Id.* at 2452.

4. *Id.* The rifle was a .22 caliber gun. Sheridan v. United States, 823 F.2d 820, 821 (4th Cir. 1987).

5. 108 S. Ct. at 2452.

6. *Id.* The district court accepted the Sheridans' version of the facts as alleged in their complaint and as supplemented by discovery. *Id.*

7. *Id.* at 2451. The district court record was not recorded.

8. *Id.* The Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982), provides in part:

> [S]ubject to the provisions of [28 U.S.C. sec. 2671-2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful acts or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where

sult of the government's negligence in allowing Carr to leave the hospital with a loaded rifle.[9] The district court dismissed the Sheridans' action, reasoning that their claim was barred by the intentional tort exception to the FTCA[10] and that "Fourth Circuit precedents[11] required dismissal because 'Carr happens to be a governmental employee rather than a private citizen.' "[12] The district court rejected the Sheridans' argument that the intentional tort exception was inapplicable because they were relying on the negligence of the government employees who failed to prevent the assault, and not on the fact that Carr was a government employee at the time of the assault.[13] The court of appeals affirmed the district court's decision.[14] The United States Supreme Court granted certiorari.[15]

The issue before the United States Supreme Court was whether the Sheridans' claim was one "arising out of" an assault or battery

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the United States, if a private person, would be liable to the claimant in accordance with the law of the place the act or omission occurred.

Id.

9. 108 S. Ct. at 2451.

10. *Id.* The exception to the FTCA, which provides the federal government with immunity for claims "arising out of" intentional torts, states in pertinent part: "[T]he provisions of [28 U.S.C. sec. 2671-2680] and section 1346(b) of this title shall not apply to—(h) any claim arising out of assault [or] battery . . ." 28 U.S.C. § 2680(h) (1982) (emphasis added).

11. *See* Hughes v. United States, 662 F.2d 219 (4th Cir. 1981). In *Hughes*, a federal postal employee, while on his postal route, committed sexual assaults on two young girls he had lured into his postal truck. *Id.* at 220. He had previously pled guilty to a related offense. *Id.* The children's parents brought an action against the government under the FTCA, claiming that the employee's supervisor was negligent in allowing the postman to remain in a position where he came into contact with young children. *Id.* The district court held that the claim was barred by § 2680(h) because the action arose from the sexual assault (intentional tort) and not from the negligence of the supervisor. *Id.* The United States court of appeals affirmed the district court's decision. *Id.*

See also Thigpen v. United States, 800 F.2d 393 (4th Cir. 1986). In *Thigpen*, a naval corpsman committed sexual assaults on two minor girls while they were hospitalized in a naval hospital. *Id.* at 394. The children's representatives brought an action alleging that the Navy was negligent in failing to supervise the Navy corpsman/assailant. *Id.* at 393. As in *Hughes*, the district court in *Thigpen* barred the claim as one arising out of an intentional tort and not from a lack of supervision by the government. *Id.* at 398.

12. 108 S. Ct. at 2452.

13. *Id.*

14. *Id. See* Sheridan v. United States, 823 F.2d 820 (4th Cir. 1987). Like the district court, the court of appeals concluded that the Fourth Circuit's prior decisions in Hughes v. United States, 662 F.2d 219 (4th Cir. 1981) and Thigpen v. United States, 800 F.2d 383 (4th Cir. 1986) were controlling. 108 S. Ct. at 2452.

15. 108 S. Ct. at 2453. The Court granted certiorari at 108 S. Ct. 747 (1988). The Supreme Court found that a conflict existed among the circuits and "we therefore granted certiorari to resolve this important conflict." 108 S. Ct. at 2453.

within the meaning of the FTCA, where an off-duty government employee committed an assault and battery, but other government employees were negligent in failing to prevent the assault and battery.[16] The majority opinion,[17] written by Justice Stevens, held that the Sheridans' claim was not barred by the intentional tort exception to the FTCA.[18]

Justice Stevens began his analysis by noting that the FTCA gives federal district courts jurisdiction over claims against the federal government:

> '[F]or injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'[19]

The Justice also recognized that this broad grant of jurisdiction "shall not apply to. . .[a]ny claim arising out of assault, battery[20] or other specified intentional torts."[21]

The majority opinion conceded that the phrase "any claim arising out of" an assault or battery is undisputedly broad enough to bar all claims based entirely on an assault or battery.[22] The Court explained, however, that the interpretation of these words becomes confused when they are applied to a claim arising out of two tortious acts, namely, an assault or battery flowing from the negligent failure to prevent the same.[23] The majority nonetheless concluded that in some situations the government cannot escape liability for an injury directly caused by an assault and battery where the gov-

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16. 108 S. Ct. at 2451.

17. *Id.* Justice Stevens' majority opinion was joined by Justices Brennan, White, Marshall, and Blackmun. *Id.* Justice White filed a concurring opinion. *Id.* at 2456. Justice Kennedy also filed a concurring opinion. *Id.* at 2456-58. Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined. *Id.* at 2458-60.

18. *Id.* at 2456.

19. *Id.* at 2453 (quoting 28 U.S.C. § 1346(b) (1982)). *See supra* note 8.

20. 108 S. Ct. at 2453 (quoting 28 U.S.C. § 2680(h) (1982)). *See supra* note 10.

21. 108 S. Ct. at 2453.

22. *Id.* at 2453-54.

23. *Id.* at 2454. The Court's exact language is as follows:

> The words 'any claim arising out of' an assault or battery are unquestionably broad enough to bar all claims based *entirely* on an assault or battery. The import of these words is less clear, however, when they are applied to a claim arising out of two tortious acts, one of which is an assault or battery and the other of which is a mere act of negligence.

Id. (emphasis in original).

ernment negligently allows the assault to occur.[24]

In reaching the instant decision, the majority relied to a great extent on its previous decision in *United States v. Muniz*.[25] The Court held in *Muniz* that a prisoner who was assaulted by other inmates could sue the United States to recover damages for injuries caused by the negligence of prison officials who failed to prevent the assault.[26]

The *Sheridan* majority cited two theories in an effort to explain why the claim in *Muniz* did not "arise out of" the assault that caused Muniz's injuries.[27] First, the Court explained that because Muniz alleged the negligence of the prison officials, the claim did not arise solely out of the assault.[28] The Court reasoned that under this view, the intentional tortfeasor's conduct would not alone give rise to government liability, but that the precedent negligence by the government employees who failed to prevent the intentional tort would, provided that the government, if a private person, would be liable under the law of the place where the incident occurred.[29] The Court noted that in response to this first theory, the government in *Sheridan* argued that the "arising out of" language must be broadly construed and that the Sheridans' negligence

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24. *Id.*

25. 374 U.S. 150 (1963). The relevant facts of *Muniz* are as follows:

> Respondent Muniz alleged that he was, in August 1959, a prisoner in a federal correctional institution in Danbury, Connecticut. On the afternoon of August 24, Muniz was outside one of the institution's dormitories when he was struck by an inmate, and then pursued by 12 inmates into another dormitory. A prison guard, apparently choosing to confine the altercation instead of interceding, locked the dormitory. The 12 inmates who had chased Muniz into the dormitory set upon him, beating him with chairs and sticks until he was unconscious. Muniz sustained a fractured skull and ultimately lost the vision of his right eye. He alleged that the prison officials were negligent in failing to provide enough guards to prevent the assaults leading to his injuries and in letting prisoners, some of whom were mentally abnormal, intermingle without adequate supervision.

Id. at 152.

26. 108 S. Ct. at 2454.

27. *Id.*

28. *Id.* The Court stated:

> First, it might be assumed that since he alleged an independent basis for tort liability—namely, the negligence of the prison officials—the claim did not arise solely, or even predominantly, out of the assault. Rather, the attention of the trier of fact is focused on the Government's negligent act or omission; the intentional commission is simply considered as part of the causal link leading to the injury.

Id.

29. *Id. See* Note, *Torts—The Talismanic Language of Section 2680(h) of the Federal Tort Claims Act*, 60 TEMP. L.Q. 43 (1987); and Note, *Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee*, 69 GEO. L.J. 803 (1981), urging this view.

claim must be barred because without Carr's assault, there would be no actionable claim.[30]

In reaching its decision in *Sheridan*, the Court declined to rely on this first theory, stating that:

> [E]ven accepting the Government's contention that when an intentional tort is a *sine qua non* of recovery the action 'arises out of' that tort, we conclude that the exception does not bar recovery in this case. We thus rely exclusively on the second theory, which provides that the intentional tort exception is simply inapplicable to torts that fall outside the scope of sec. 1346(b)'s general waiver.[31]

The Court stated that this second explanation for the *Muniz* holding is an adoption of Judge Harlan's reasoning in *Panella v. United States*.[32] In *Panella*, a prisoner brought a cause of action against the United States under the FTCA claiming that an assault by another inmate had been caused by the negligence of federal employees.[33] Judge Harlan, recognizing that the "immunity against claims arising out of assault and battery can literally be read to apply to assaults committed by persons other than government employees,"[34] concluded that section 2680(h) must be read against the rest of the Act.[35] Accordingly, Justice Stevens further reasoned that "[t]he exception should therefore be construed to apply only to claims that would otherwise be authorized by the basic waiver of sovereign immunity."[36] Justice Stevens reasoned that because an assault committed by a non-employee of the government could not provide the basis for an actionable claim under the FTCA, the in-

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30. 108 S. Ct. at 2454. The Court did not feel the need to resolve the dispute created by their first theory and the government's responding argument. The Court instead relied exclusively on their second theory. *Id. See infra* text.

31. 108 S. Ct. at 2454.

32. 216 F.2d 622 (2d Cir. 1954). The relevant facts are as follows:

> Arnold Panella was convicted under a Kentucky statute in a Kentucky State Court as a habitual drug addict. He was sentenced to 12 months in jail, but placed on probation upon his election to undergo treatment for his addiction at the Public Health Service Hospital in Lexington, Ky., maintained and controlled by the United States through the Army Surgeon General. While an inmate at that institution he was allegedly assaulted by another inmate. He has sued the United States under the Federal Tort Claims Act, 28 U.S.C.A. secs. 1346, 2674, and 2680, to recover damages for his injuries, claiming that the assault was caused by the negligence of employees of the United States in failing to provide adequate guards and otherwise properly supervise those confined in the institution.

Id. at 623.

33. *Id.*

34. 108 S. Ct. at 2454 (citing *Panella*, 216 F.2d at 624).

35. *Id.*

36. *Id.* at 2454-55.

tentional tort exception likewise could not apply to the assault.[37] He further opined that the exception only applies, and retains immunity for the United States, in cases arising out of assaults committed by federal employees.[38]

Applying Judge Harlan's analysis[39] in *Panella* to the *Sheridan* case, Justice Stevens stated that:

> If nothing more was involved here than the conduct of Carr at the time he shot at petitioners, there would be no basis for imposing liability on the Government. The tortious conduct of an off- duty serviceman, not acting within the scope of his office or employment, does not in itself give rise to Government liability whether that conduct is intentional or merely negligent.
>
> As alleged in this case, however, the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of Carr's employment status. [40]

Relying on the assumption made by the district court and the court of appeals that the Sheridans' version of the facts would support recovery under Maryland law on a negligence theory if the naval hospital had been owned and operated by a private person, the Court stated:

> It seems perfectly clear that the mere fact that Carr happened to be an off-duty Federal employee should not provide a basis for protecting the Government from liability that would attach if Carr had been an unemployed civilian patient or visitor in the hospital. Indeed, in a case in which the employment status of the assailant has nothing to do with the basis for im-

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37. *Id.* at 2455. This is the Court's reasoning for their conclusion that the intentional tort exception is inapplicable to torts that fall outside the scope of the FTCA's general waiver of the government's immunity from liability.

38. *Id.*

39. *Id.* Judge Harlan emphasized the statutory language that was critical to his analysis in describing the coverage of the FTCA. He explained that the FTCA authorizes actions for personal injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. . . (italics supplied)." *Id.* (citing *Panella*, 216 F.2d at 623). The Sheridan Court stated: "We need only move the emphasis to the next phrase—'while acting within the scope of his office or employment'—to apply his [Harlan's] analysis to the assault and battery committed by the off-duty, inebriated enlisted man in this case." *Id.*

40. *Id.* The Court further stated that:

> By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the Government assumed responsibility to 'perform [its] good Samaritan task in a careful manner.' Indiana Towing Co. v. United States, 350 U.S. 61, 65, 76 S. Ct. 122, 124, 100 L.Ed. 48 (1955).

Id.

> posing liability on the Government, it would seem perverse to exonerate the Government because of the happenstance that Carr was on a Federal payroll.[41]

The Court also stated that the characterization of Carr's conduct as intentional rather than negligent was irrelevant. [42] The majority concluded its opinion by stating that "because neither Carr's employment status[43] nor his state of mind has any bearing on the basis for petitioners' claim for money damages, the intentional tort exception to the FTCA is not applicable in this case."[44] The judgment of the court of appeals was reversed and the case was remanded.[45]

Justice White, in a short concurring opinion,[46] indicated that his views previously expressed in *United States v. Shearer*[47] are inconsistent with his present understanding of the application of the FTCA.[48] Justice White indicated that he and three other Justices[49] were of the view that section 2680(h) bars recovery where an assault by a government employee results from the negligent act of another employee.[50] He indicated, however, that the court in

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41. *Id.* The Court noted that the government may be responsible for an assault even though the identity of the assailant is unknown. The Court cited as an example Doe v. United States, 838 F.2d 220 (1988), which held that an action could be brought under the FTCA even though discovery failed to identify the assailant as a government employee. 108 S. Ct. at 2455 n.7.

42. 108 S. Ct. at 2456. The Court further reasoned that:

> If the Government has a duty to prevent a foreseeably dangerous individual from wandering about unattended, it would be odd to assume that Congress intended a breach of that duty to give rise to liability when the dangerous human instrument was merely negligent but not when he or she was malicious. In fact, the human characteristics of the dangerous instrument are also beside the point. For the theory of liability in this case is analogous to cases in which a person assumes control of a vicious criminal, or perhaps an explosive device. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

Id.

43. The Court noted that "[b]ecause Carr's employment status is irrelevant to the outcome, it is not appropriate in this case to consider whether negligent hiring, negligent supervision, or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee." *Id.* at n.8.

44. *Id.* at 2456.

45. *Id.*

46. *Id.*

47. 473 U.S. 52 (1985). In *Shearer*, a plurality of the court held that § 2680(h) barred a claim caused by a government employee's assault which allegedly resulted from the negligence of another employee. *Id.* at 52.

48. 108 S. Ct. at 2456.

49. *Id.* Chief Justice Burger and Justices Rehnquist and O'Connor shared this view with Justice White. 473 U.S. at 53.

50. 108 S. Ct. at 2456.

Shearer did not address the issue of whether or not it makes a difference as to whether the assailant is acting within the scope of his employment.[51] Justice White concluded his concurrence by stating that "to the extent the views I shared there [in *Shearer*] are inconsistent with my present understanding, I think the Court's opinion, which I join, has the better of it."[52]

Justice Kennedy contended in his concurring opinion[53] that the majority's adoption of Judge Harlan's reasoning in *Panella* was misdirected.[54] He reasoned that the Sheridans' claim was that the government was negligent, independent from the intentional tort committed by Carr.[55] Therefore, Justice Kennedy argued, the issue to be resolved was how to give effect to the FTCA's authorization of negligence suits without disemboweling the Act's exception of claims "arising out of" intentional torts.[56]

Justice Kennedy criticized the Court for its failure to clarify the meaning of "independent" negligence and for its failure "to explain how the legal significance of antecedent negligence somehow changes with the employment status of the intentional tortfeasor."[57] The Justice also criticized the Court for its avoidance of whether a negligent hiring or negligent supervision claim may

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51. *Id.*

52. *Id.* The Court stated in *Shearer* that: "[R]espondent cannot avoid the reach of sec. 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims for assault or battery; in sweeping language it excludes any claim arising out of assault or battery." 473 U.S. at 55.

53. 108 S. Ct. at 2456-58. Justice Kennedy stated that: "I write separately to set forth the bases for my differences with those opinions (the majority and dissenting opinions), and for my conclusion that the Court correctly decides that the judgment of the Court of Appeals must be reversed." *Id.* at 2456.

54. *Id.* at 2457. Justice Kennedy stated that:

> In an adaptation of Judge Harlan's analysis in Panella v. United States, 216 F.2d 622 (CA2 1954), the Court asks whether the tortfeasor's actions occurred 'while acting within the scope of his office or employment.' *Ante*, at 2455. Since 'the tortious conduct of an off-duty serviceman, not acting within the scope of his office or employment, does not in itself give rise to Government liability whether that conduct is intentional or merely negligent,' the Court concludes that the intentional tort exception is inapplicable to this case. *Ante*, at 2455-2456. In my view, this analysis is misdirected.

Id.

55. *Id.*

56. *Id.* Justice Kennedy stated that the determination of whether or not the assailant was acting within the scope of his employment will not necessarily resolve this issue. *Id.* The Justice further stated that "[t]he proper inquiry must depend on an analysis of the Government's acts or omissions and of the theory on which the Government's negligence is predicated." *Id.*

57. *Id.*

ever provide the basis for liability under the FTCA.[58]

Although agreeing that the dissenting opinion[59] was correct to focus on the statutory language of the FTCA, Justice Kennedy contended that "[t]he dissent's fundamental premise seems to be that any injury in which an intentional act is a substantial cause necessarily arises only from that intentional act. This contradicts the basic rule that the same injury can arise from more than one wrongful act. . . ."[60] Justice Kennedy expressed his agreement with the opinion of Chief Judge Winter, who authored the dissenting opinion of the *Sheridan* case when it was before the court of appeals.[61] Adopting Judge Winter's reasoning, Justice Kennedy opined that:

> [T]o determine whether a claim arises from an intentional assault or battery and is therefore barred by the exception, a Court must ascertain whether the alleged negligence was the breach of a duty to select or supervise the employee-tortfeasor or the breach of some separate duty independent from the employment relation. . . . If the allegation is that the Government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception of sec. 2680(h) bars the claim.[62]

Otherwise, Justice Kennedy stated, to allow such claims would frustrate the purpose of section 2680(h).[63]

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58. *Id.* Justice Kennedy stated:

> Although its opinion asserts that it avoids the question of whether a negligent supervision claim may be pressed against the Government in such a case, Ante, at 2456, that issue is unavoidable, both as an analytic matter and on the facts of this case. As I explain more fully below, our inquiry should address whether a finding of liability for negligent supervision would undermine substantially the intentional tort exception.

Id. *See supra* note 43.

59. 108 S. Ct. at 2458-60.

60. *Id.* at 2457. In support of his contention, Justice Kennedy cited the following passage:

> Where voluntary acts of responsible human beings intervene between defendant's conduct and plaintiff's injury, the problem of foreseeability is the same and courts generally are guided by the same test. If the likelihood of the intervening act was one of the hazards that made defendant's conduct negligent—that is, if it was sufficiently foreseeable to have this effect—then defendant will generally be liable for the consequences . . . so far as scope of duty . . . is concerned, it should make no difference whether the intervening actor is negligent or intentional or criminal. 2 F. HARPER & F. JAMES, LAW OF TORTS. sec. 20.5, pp. 1143 1145 (1956).

Id.

61. *Id.* at 2458.

62. *Id.*

63. *Id.* Justice Kennedy opined that "litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors." *Id.* Justice

Lastly, Justice Kennedy asserted in his concurrence that the government's negligent performance of its Good Samaritan duty under the law of Maryland would create government liability if Carr had been a private person.[64] The Justice contended further that on this theory, the government's negligence is independent of and does not depend on the employment status of the intentional tortfeasor.[65]

In sum, Justice Kennedy stated that where the plaintiff's claim is based on the employment relation between the intentional tortfeasor and the government, such as a negligent hiring or supervision claim, section 2680(h) applies and the United States enjoys immunity.[66] However, where the plaintiff's claim is based on the independent negligence of the government, section 2680(h) is inapplicable and the government is stripped of its immunity.[67]

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented from the holding in *Sheridan*.[68] The dissent argued in favor of a much broader construction of section 2680(h) which would encompass all injuries associated in any way with an assault or battery.[69] The dissenters rejected the majority's inter-

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Kennedy further argued that:

> The Court is wrong to imply that this issue is somehow removed from the facts of this case. It is squarely implicated here, and the trial court should be advised how to deal with it, not left to wonder. It is quite plausible to argue that Carr was mis-supervised by Government officers who had authority over him and had, we may assume, the duty to control his unauthorized behavior and enforce the Government regulations restricting the possession of firearms on the naval base. Absent the exception set forth in sec. 2680(h), the Government could be held negligent for failing to supervise Carr in a way such that the rifle would be discovered.

Id.

64. *Id.*

65. *Id.* Justice Kennedy clearly stated that "[t]he intentional tort exception does not preclude recovery under a theory of independent governmental negligence, despite the presence of a (barred) negligent supervision claim." *Id.*

66. *Id.*

67. *Id.*

68. *Id. See supra* note 59.

69. 108 S. Ct. at 2459. The dissent explained that:

> If we were to construe the words according to their ordinary meaning, we would say that a claim 'arises out of' a battery in any case in which the battery is essential to the claim. Thus when the Court construed another exception to the FTCA for claims 'arising in respect of. . .the detention of any goods' by customs or law enforcement officials, 28 U.S.C. sec. 2680(c), we equated 'arising in respect of' with 'arising out of' and decided that the phrase includes 'all injuries associated in any way with the detention of goods.' See Kosak v. United States, 465 U.S. 848, 854, 104 S. Ct. 1519, 1523-1524, 79 L.Ed.2d 860 (1984). A parallel construction of the exception at issue here leads to the conclusion that it encompasses all injuries associated in any way with an assault or battery. Indeed, four Justices described the exception essentially in

pretation of *Muniz*[70] and further opined that the legislative history of section 2680(h) does not support the narrow limitation adopted by the majority.[71] Justice O'Connor also indicated that intentional torts are often times held to be superseding causes which act to absolve a negligent party from liability.[72] Lastly, the dissent expressed hope that the Court would at least preserve "the core of the assault and battery exception" by applying the exception to claims of negligent supervision of a government employee who commits an assault or battery while acting within the scope of his employment.[73]

Because the *Sheridan* decision was based on the construction of the intentional tort exception to the FTCA, a brief recital of the statute's history and its pertinent provisions will place the Court's decision in perspective. At English common law, the notion of "sovereign immunity" developed based on the idea that "the King could do no wrong."[74] Early American courts applied the English common law rule,[75] which meant that the United States could not be sued without its consent.[76] In 1946, Congress enacted the Federal Tort Claims Act, where for the first time, the federal government subjected itself to liability for the "negligent or wrongful acts

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this way in United States v. Shearer, 473 U.S. 52, 105 S. Ct. 3039, 87 L.Ed.2d 38 (1985).

Id.

70. *Id.* Justice O'Connor stated that: "The Court's decision in this case extends its erroneous interpretation of *Muniz*. . . . Because I reject the interpretation of *Muniz* on which the majority's argument is premised, I reject this extension as well." *Id.* at 2459-60.

71. *Id.* at 2460. The dissent pointed out that when Congress enacted the exception, "Mr. Holtzoff, a Special Assistant to the Attorney General, told the Senate in general terms that the torts of assault and battery were excluded from the FTCA." *Id.* (citing Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 39 (1940)). At the Hearings, Mr. Holtzoff explained that:

> [T]he theory of these exemptions is that since this bill is a radical innovation, perhaps we had better take it step by step and exempt certain torts and certain actions which might give rise to tort claims that would be difficult to defend, or in respect to which it would be unjust to make the Government liable.

108 S. Ct. at 2460 (citing Tort Claims Against the United States: Hearings on H.R. 7236 before Subcommittee No. 1 of the House Committee on the Judiciary, 76th Cong., 3d Sess., 22 (1940)).

72. 108 S. Ct. at 2460.

73. *Id.*

74. W. PROSSER AND W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, § 131 at 1033 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

75. *See* Cohen v. Virginia, 19 U.S. (6 Wheat.) 264, 380 (1821); Kawananakoa v. Polybank, 205 U.S. 249 (1907).

76. PROSSER AND KEETON, *supra* note 74, at 1033.

or omissions" of its employees.[77] At the same time, however, Congress retained the sovereign immunity of the United States for claims arising out of certain enumerated intentional torts by enacting section 2680(h).[78] Thus, the federal government is liable for clearly negligent acts and is not liable for clearly intentional ones. However, where an injury results from both negligent and intentional conduct, the result has been less clear.

Courts have been quite willing to bar a claim against the federal government, *via* section 2680(h), where a plaintiff's injury is solely caused by the conduct of a federal employee that can only be categorized as intentional.[79] Additionally, courts have habitually allowed actions by plaintiffs who have alleged that government negligence led to an assault and battery by a third person not employed by the government.[80] The courts have been in conflict, however,

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77. Pub. L. No. 79-601, §§ 401-22, 60 Stat. 842 (1946) (codified at 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671-78, 2680 (1982)). *See supra* note 8 for the pertinent language of the FTCA.

78. 28 U.S.C. § 2680(h) (1982). *See supra* note 10 for the relevant language of § 2680(h).

79. *See* Lambertson v. United States, 528 F.2d 441 (2d Cir.), *cert. denied*, 426 U.S. 921 (1976). In *Lambertson*, a federal employee jumped on the plaintiff's back riding him piggy back. *Id.* at 442. The court held that the federal employee's conduct constituted a battery within § 2680(h), and that plaintiff's claim could not be maintained under the FTCA predicated on negligence. *Id.* at 443-44.

In Lewis v. United States, 194 F.2d 689 (3d Cir. 1952), the court held that a civilian could not recover from the government as a result of being struck by a bullet when a guard fired at the tire of civilian's car to prevent his escape. *Id.* at 689-90. The court reasoned that because use of the gun constituted excessive force, the plaintiff's injury was due to assault. *Id.* at 694-95.

In Stepp v. United States, 207 F.2d 909 (4th Cir. 1953), a civilian seaman was shot by an army guard for failure to halt when so directed. *Id.* The court held that the plaintiff's action was barred by § 2680(h) because the shooting was clearly intentional. *Id. See also* Wine v. United States, 705 F.2d 366 (10th Cir. 1983). In *Wine*, an action was brought under the FTCA against the United States by a plaintiff who was sexually assaulted and shot by an off-duty Air Force sergeant. *Id.* In affirming the district court's dismissal, the court of appeals stated that the plaintiff's claim was barred by § 2680(h) "where the claim arises out of assault, battery or various other enumerated torts." *Id.*

In Doe v. United States, 769 F.2d 174 (4th Cir. 1985), an Air Force clinical social worker sexually assaulted a military dependent. *Id.* The court barred the plaintiff's action, holding that the social worker's assault fell within § 2680(h) as clearly intentional. *Id. See also* Hughes v. United States, 662 F.2d 219 (4th Cir. 1981). *See supra* note 11.

80. *See* United States v. Muniz, 374 U.S. 150 (1963). *See also* Brown v. United States, 486 F.2d 284 (8th Cir. 1973) (where a prisoner claims that the negligence of the federal government led to an attack by fellow inmates, the substance of the claim is negligence); Rogers v. United States, 397 F.2d 12 (4th Cir. 1968) (section 2680(h) inapplicable to claim against the government for failing to provide protection); Fleishour v. United States, 244 F. Supp. 762 (N.D. Ill. 1965), *aff'd*, 365 F.2d 126 (7th Cir. 1966), *cert. denied*, 385 U.S. 987 (1967) (court held that 28 U.S.C. § 2680(h) did not bar a federal prisoner's negligence action where prison officials placed approximately 40 prisoners in a single dormitory room, with no

where the government's negligence leads to an assault and battery by a governmental employee.

Most courts, relying on dictum in *Panella v. United States*,[81] have concluded that section 2680(h) bars a negligence claim against the government for failing to prevent a federal employee's assault and battery upon a plaintiff.[82] In *Panella*, a patient in a federal mental hospital stabbed a fellow patient.[83] The injured patient brought an action against the United States under the FTCA, claiming that the assault and battery was caused by the negligence of government employees in failing to provide sufficient guards and proper supervision of the other patients.[84] The district court dismissed the claim, holding that it "involved a claim arising out of assault."[85] The Second Circuit reversed, ruling that the intentional tort exception to the FTCA does not bar a claim when government negligence allows for an intentional tort by someone other than a

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guard present, resulting in prisoner's assault by a fellow inmate); Cohen v. United States, 252 F. Supp. 679 (N.D. Ga. 1966), *rev'd on other grounds*, 389 F.2d 689 (5th Cir. 1967) (court held that § 2680(h) was inapplicable where plaintiff was beaten by a fellow prisoner and alleged negligence of prison officials in allowing a dangerous prisoner to escape from maximum confinement).

81. 216 F.2d 622 (2d Cir. 1954). *See supra* note 32.

82. *See* Naisbitt v. United States, 611 F.2d 1350 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980) (court held that § 2680(h) bars a claim against the government for negligently failing to prevent violent behavior of off-duty soldiers); Muniz v. United States, 305 F.2d 285, 286 (2d Cir. 1962) (court stated in dictum that § 2680(h) bars a negligence claim against the government when a federal employee commits an intentional tort); Collins v. United States, 259 F. Supp. 363, 364 (E.D. Pa. 1966) (court held that a cause of action grounded in the government's negligent hiring and based on a government employee's assault and battery is barred by § 2680(h)); Davidson v. Kane, 337 F. Supp. 922, 923 (E.D. Va. 1972) (court held that § 2680(h) bars a claim that the government negligently failed to prevent intentional torts by airport policeman); Moffit v. United States, 430 F. Supp. 34, 38 (E.D. Tenn. 1976) (court adopted the employee/nonemployee approach set forth in *Panella*, but held that § 2680(h) does not bar a negligence claim where a mail carrier, in attacking plaintiff, lacked the requisite mental state to commit the intentional tort); Pennington v. United States, 406 F. Supp. 850, 851 (E.D.N.Y. 976) (court held that § 2680(h) bars a negligence claim against the government for inadequate training or negligent supervision of an off-duty government employee who assaulted plaintiff); Gale v. United States, 491 F. Supp. 574, 578 (D.S.C. 1980) (court adopted the employee/nonemployee approach, but held that § 2680(h) was not a bar to a negligence claim when a Marine acted outside the scope of duty by assaulting plaintiff); Johnson v. United States, 258 F. Supp. 372 (E.D. Va. 1966) (court held that § 2680(h) would have been applicable if the assault on the federal prisoner had been inflicted by a government employee instead of by another prisoner).

83. 216 F.2d at 623.

84. *Id.*

85. *Id.* A final judgment, dismissing the complaint upon motion of the United States for summary judgment under rule FED. R. CIV. P. 56 was entered in the United States District Court for the Southern District of New York. *Id.*

government employee.[86] In dictum, the court suggested that section 2680(h) would bar a negligence claim where a plaintiff attempts to hold the government liable on a negligence theory for assaults committed by government employees.[87] Thus, under the reasoning set forth in *Panella*, if an assault and battery results from government negligence, the application of section 2680(h) depends on whether the assailant is an employee of the government.[88]

The employee/nonemployee approach adopted in *Panella* has been followed by a majority of courts.[89] In *Naisbitt v. United States*,[90] for example, two off-duty airmen raped, killed, and assaulted a number of civilians.[91] The victims' representatives brought suit[92] against the United States under the FTCA, alleging the negligence of the government in failing to supervise and curtail the two airmen.[93] The plaintiffs argued that the airmen's conduct was reasonably foreseeable and, therefore, the Air Force supervisors had a duty to restrain the airmen.[94] The plaintiffs further argued that the failure of the Air Force supervisors to fulfill this duty resulted in an actionable negligence claim under the FTCA.[95]

The district court dismissed the action "on the ground that the claim actually arose from assault and battery and was therefore barred by 28 U.S.C. sec. 2680(h). . . ."[96] The United States Court of Appeals for the Tenth Circuit affirmed the district court's decision.[97] However, the court recognized that when the government

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86. *Id.* at 624.

87. *Id.* at 624-25.

88. *See supra* note 29 (citing law review articles advocating this view).

89. *See* Naisbitt v. United States, 611 F.2d 1350, 1353 (10th Cir. 1980) (citing Pennington v. United States, 406 F. Supp. 850 (E.D.N.Y. 1976); and Collins v. United States, 259 F. Supp. 363 (E.D. Pa. 1966)).

90. 611 F.2d 1350 (10th Cir. 1980).

91. *Id.* at 1351.

92. There were five different law suits which were consolidated for trial and appeal. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* The court stated that "the theory of plaintiffs' case is that the United States was guilty of actionable negligence in failing to supervise and curtail the two airmen in question in that it was reasonably foreseeable that they would, unless restrained, perpetrate serious injuries." *Id.*

96. *Id.* at 1352. In justifying its judgment of dismissal based on the principle that a distinction is to be drawn between assault committed by government employees and assaults which are committed by non-government employees, the district court cited Pennington v. United States, 406 F. Supp. 850 (E.D.N.Y. 1976); Panella v. United States, 216 F.2d 622 (2d Cir. 1954); and Muniz v. United States, 305 F.2d 285 (2d Cir. 1962), *aff'd*, 374 U.S. 150 (1963). *See also* Davidson v. Kane, 337 F. Supp. 922 (E.D. Va. 1972).

97. 611 F.2d at 1356.

has a duty to prevent a nonemployee from committing an assault and fails to fulfill that duty, section 2680(h) does not bar a negligence claim based on the resulting injury.[98]

A minority of courts do not follow the employee/nonemployee rationale in applying section 2680(h), but instead give emphasis to the legal causation issue.[99] For example, in the decision of *Underwood v. United States*,[100] the Fifth Circuit focused on the plaintiffs' negligence claim, rather than on the intentional tort.[101] In *Underwood*, an action was brought against the United States arising out of an airman's killing of his former wife.[102] The decedent's father and personal representative claimed that the United States negligently released the assailant from a psychiatric clinic back to active duty, which gave him access to weapons.[103] The United States denied that it owed any duty or that it breached any duty that may have existed.[104] The district court held for the United States,[105] but the United States court of appeals reversed, reason-

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98. *Id.*

99. *See* United States v. Shively, 354 F.2d 294, 296-97 (5th Cir.), *cert. denied*, 382 U.S. 883 (1965) (court said that government's negligence in issuing a gun was not the cause of injury where plaintiff sued under FTCA alleging the negligence of United States in allowing her husband, a serviceman, to have access to weapons in violation of regulations and despite knowledge of his past mental condition). *See also* Underwood v. United States, 356 F.2d 92 (5th Cir. 1966), discussed *infra* notes 100-107 and accompanying text; and Fair v. United States, 234 F.2d 288 (5th Cir. 1956), discussed *infra* notes 108-114 and accompanying text.

100. 356 F.2d 92 (5th Cir. 1966).

101. *Id.*

102. *Id.*

103. *Id.* at 94. The father and personal representative claimed that the United States was negligent in the following respects:

> (1) By allowing Edward F. Dunn, an airman in the United States Air Force stationed at Maxwell Air Force Base, Alabama, who was in an emotionally and mentally disturbed state of being, which condition was known to the agents of the United States at Maxwell Air Force Base, to obtain a .45 caliber automatic pistol that was used by Airman Dunn to kill Shirley Underwood; and (2) By allowing Edward F. Dunn, known by the agents of the United States to be in an emotionally and mentally disturbed state, to return to duty, the performance of which gave him access to a dangerous instrumentality, to-wit, a .45 caliber automatic pistol.

Id.

104. *Id.*

105. *Id.* The district court ruled there was no negligence on the part of the medical officers in releasing Dunn to active duty and no causal connection between his release and the subsequent killing. *Id.* The court further stated that:

> [A]lthough Airman Dunn did not follow the standard Air Force procedure for drawing his weapon, no liability can be predicated on the theory that he obtained a weapon belonging to the United States for the reason that it was not reasonably foreseeable that he would use this weapon, or any weapon, as a means of killing Shirley Underwood Dunn.

ing that the government's negligent release of the assailant to active duty, which gave him access to weapons, proximately caused the decedent's death.[106] Therefore, the court held that section 2680(h) did not apply.[107]

Another Fifth Circuit decision, *Fair v. United States*,[108] examined a claim of negligently caused assault and battery. [109] In *Fair*, an Air Force officer shot and killed a student nurse, two guards, and then himself.[110] The complaint alleged that the officer had previously threatened the life of the nurse and that Air Force medical officers knew of the threats and had promised to notify the nurse before releasing the officer.[111] The government moved to dismiss,[112] and the district court granted the motion.[113] The Fifth Circuit reversed and remanded, holding that the complaint properly alleged government negligence, thereby entitling the plaintiffs to a trial.[114]

The Third Circuit has also relied primarily on the duty/causation approach. In *Gibson v. United States*,[115] the plaintiff brought an action against the United States under the FTCA to recover for injuries inflicted by a Job Corps trainee.[116] The complaint alleged that the government was negligent in failing to "take reasonable

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Id.

106. *Id.* at 99. The court stated:

> Under the circumstances of the present case, we are left in no doubt that negligently releasing Dunn to duty which gave him access to weapons, and negligently permitting Dunn to draw the .45 caliber pistol and ammunition with which he shot and killed his former wife were proximately connected with Mrs. Dunn's death.

Id.

107. *Id.*

108. 234 F.2d 288 (5th Cir. 1956).

109. *Id.*

110. *Id.* at 290.

111. *Id.*

112. *Id.* The government moved to dismiss, arguing "that the exclusionary provisions of the Federal Tort Claims Act defeated the court's jurisdiction, and that the complaint stated no claim upon which relief could be granted." *Id.*

113. *Id.*

114. *Id.* at 296. The court stated: "[W]e hold that the complaint is sufficient under the authorities discussed to entitle plaintiffs to a trial on the facts." *Id.*

115. 457 F.2d 1391 (3d Cir. 1972).

116. *Id.* at 1392-93. Gibson was employed by the Federal Electric Co. to train Job Corps enrollees at the Ranitan Arsenal in Edison, New Jersey. *Id.* Jessie, a juvenile delinquent with a known history of narcotics abuse, was a Job Corps trainee employed by the United States. *Id.* at 1393. The United States was aware of Jessie's drug abuse. *Id.* On November 5, 1966, Jessie drove a screwdriver through Gibson's temple while Gibson was engaged in the performance of his duties as a Job Corps instructor. Jessie was engaged in his employment with the United States and was under the influence of narcotics at the time of the assault. *Id.*

measures for appellant's safety, thereby causing him to suffer injuries. . . ."[117] The district court dismissed the action for lack of subject matter jurisdiction, reasoning that the claim fell within section 2680(h).[118] The court of appeals held that section 2680(h) did not bar the negligence claim for two reasons.[119] First, the court determined that the assailant's attack was a foreseeable consequence of the government's failure to exercise due care and, therefore, did not supercede the government's negligence.[120] Second, the court stated that it did not think that Congress intended the exception to apply to the facts in *Gibson*.[121]

Similarly, the Ninth Circuit, in *Bennett v. United States*,[122] determined that where government negligence is the proximate cause of the injury, section 2680(h) does not shield the government from liability.[123] In *Bennett*, the parent plaintiffs brought an action under the FTCA against the United States on behalf of their sexually abused children.[124] The district court held for the government, but the court of appeals reversed, holding that section 2680(h) does not absolve the United States from liability for a teacher's sexual assaults of students.[125] The court reasoned that the government was negligent in hiring the teacher,[126] and rejected the analysis of government liability based upon the distinction between gov-

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117. *Id.*

118. *Id.* at 1392. The district court granted the government's motion to dismiss pursuant to § 2680(h) "as a claim arising out of assault and battery." *Id.* at 1393.

119. *Id.* at 1395.

120. *Id.* The court further stated that "the injury arose out of the basic negligence of the United States and the attack was the foreseeable consequence of the original misconduct." *Id.*

121. *Id.*

122. 803 F.2d 1502 (9th Cir. 1986).

123. *Id.*

124. *Id.* at 1502-03. The facts of the case are as follows: Terry Lee Hester applied for a teaching position at a boarding school for the Bureau of Indian Affairs. *Id.* He represented on his application for employment that he had been previously arrested and charged with violating Public Decency statutes. *Id.* at 1503. The government made no investigation and employed Hester as a teacher. *Id.* Hester subsequently kidnapped, assaulted and raped several students enrolled at the boarding school while he was off-duty. *Id.*

125. *Id.* at 1502.

126. *Id.* In reaching its decision, the court relied to a great extent on a previous Ninth Circuit decision, Jablonski *ex rel.* Pahls v. United States, 712 F.2d 391 (9th cir. 1983). In *Jablonski*, the Ninth Circuit held that where the government's negligence consisted in failing to exercise due care in dealing with a mental patient known by responsible government agents to be homicidal, § 2680(h) does not shield the government from liability. *Id.* at ___. The court reasoned that because the government had notice and could have prevented the crime by the exercise of due care, the government was liable for its own negligence. *Id.*

ernment employees and nonemployees.[127] Thus, under the reasoning set forth in *Bennett*, an analysis of government liability requires an examination of the negligence which led to the assault and battery, rather than the employment status of the intentional tortfeasor.[128]

Justice Stevens, writing for the majority in *Sheridan*, adopted Judge Harlan's reasoning in *Panella v. United States*.[129] The majority arrived at a rather complicated holding that the intentional tort exception to the FTCA is inapplicable to torts that fall outside the scope of section 1346(b)'s general waiver of governmental immunity.[130] The Court reasoned that section 2680(h) should be construed to bar only those claims that would otherwise be authorized by section 1346(h).[131] Justice Stevens further explained that because an assault committed by a nonemployee would not authorize a claim under the FTCA, the exception could not apply to bar such an assault; more correctly, the Court stated, the exception is only applicable to claims arising out of assaults committed by federal employees.[132] Therefore, under Justice Stevens' reasoning, when determining whether the intentional tort exception applies to bar a particular claim, it must first be determined whether the claim is authorized under section 1346(b).[133]

Justice White's concurring opinion[134] suggested a change of position as to his previously held view, in *United States v. Shearer*,[135] that section 2680(h) bars recovery for damage caused by an assault committed by a government employee resulting from the negli-

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127. 803 F.2d at 1504. The *Bennett* court stated that "the only distinction between the government's alleged negligence in this case and *Jablonski* is that Hester was on the government payroll and Jablonski's negligence was a proximate cause of the injury in both cases . . . [W]e note that this result is consistent with that reached in other jurisdictions." *Id.* (citing Shearer v. United States, 723 F.2d 1102 (3d Cir. 1984), *rev'd on other grounds*, 473 U.S. 52 (1985); Underwood v. United States, 489 F. Supp. 1030 (D. Mass. 1980)). The *Bennett* court added that "even some cases compelled to deny liability by their circuit's precedent concede that the distinction between governmental employees and non-employees is irrational." *Id.* at 1504 (citing Wine v. United States, 705 F.2d 366 (10th Cir. 1983)).

128. *See supra* note 41. *See also* Doe v. United States, 838 F.2d 220 (7th Cir. 1988); Andrews v. United States, 732 F.2d 366 (4th Cir. 1984) (court held that § 2680(h) did not bar plaintiff's claim for negligent supervision which led to assault and battery).

129. 216 F.2d 622 (2d Cir. 1954). *See supra* notes 32-40 and accompanying text.

130. Sheridan v. United States, 108 S. Ct. 2449, 2454 (1988). *See supra* note 37 and accompanying text.

131. 108 S. Ct. at 2454-55. *See supra* notes 36-38 and accompanying text.

132. 108 S. Ct. at 2455.

133. *Id.* at 2454-55.

134. *Id.* at 2456.

135. 473 U.S. 52 (1985).

gence of other government employees.[136] However, *United States v. Shearer* involved a claim where the theory of government negligence was predicated on negligent supervision.[137] Therefore, Justice White's views expressed in the *Sheridan* case are not necessarily inconsistent with those expressed in *Shearer* because "the intentional tort exception does not preclude recovery under a theory of independent governmental negligence, despite the presence of a (barred) negligent supervision claim."[138]

Although Justice Stevens' majority opinion reaches a correct conclusion, its analysis is misplaced. The Court is wrong to focus, as Justice Kenendy's concurrence suggests,[139] on whether the tortfeasor's actions occurred "while acting within the scope of his office or employment."[140] Instead, the Court should have concentrated on an analysis of the government's antecedent negligence.[141] Under this analysis, the focal point is the theory on which the government's negligence is predicated[142] (*i.e.*, is the theory of negligence based upon negligent hiring or supervision, or upon the independent negligence of the government?). As Justice Kennedy pointed out in his concurrence, the majority apparently would allow a claim against the government if it is based on the negligence "of other government employees . . . that is entirely independent of [the intentional tortfeasor's] employment status."[143] However, the Court fails to explain "the meaning of 'independent' negligence or to explain how the legal significance of antecedent negligence somehow changes with the employment status of the intentional tortfeasor."[144]

The majority also fails to address the issue of whether a negligent supervision or hiring claim may ever be authorized under the FTCA.[145] Justice Kennedy's concurrence and Justice O'Connor's dissenting opinion correctly argue, however, that where a claim arises out of government negligence and a subsequent intentional

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136. See *supra* notes 46-52 and accompanying text.

137. 108 S. Ct. at 2459.

138. *Id.* at 2458.

139. *Id.* at 2456-57. *See supra* notes 54 and accompanying text.

140. 108 S. Ct. at 2457.

141. This is the view advocated by Justice Kennedy in his concurring opinion. He stated: "The proper inquiry must depend on an analysis of the Government's acts or omissions and of the theory on which the Government's negligence is predicated." *Id. See supra* note 56.

142. 108 S. Ct. at 2458.

143. *Id.* at 2457.

144. *Id.*

145. *Id.* at 2456 n.8. *See supra* note 58 and accompanying text.

tort, section 2680(h) applies to bar the claim if the theory of government negligence is that the government was negligent in the supervision or selection of the employee.[146] To allow such claims would erode the core of the exception.

Justice O'Connor, dissenting[147] from the holding in the *Sheridan* case, would apply the intentional tort exception to bar any claim "associated in any way with an assault or battery,"[148] regardless of the existence of any negligence on the part of the government.[149] Such a broad construction of the exception is unwarranted and unjustified.

The dissent argues that "intentional torts sometimes are found to be superceding causes that relieve a negligent party of liability."[150] In support of this contention, the dissent cites section 448 of the RESTATEMENT (SECOND) OF TORTS.[151] However, section 448 makes clear that a third person's commission of an intentional tort is not a superceding cause where the intentional act is reasonably foreseeable.[152] Therefore, the clear language of section 448 would operate to impose liability on the government in *Sheridan* (because Carr's assault and battery was reasonably foreseeable), and not, as the dissent suggests, absolve the government of responsibility.

In conclusion, where a claim arises out of an intentional tort, and the negligence that precedes it, courts should focus on an analysis of the theory on which the government's antecedent negligence is predicated when determining whether the intentional tort exception to the FTCA applies to bar a particular claim. Where the theory of government negligence is an allegation of negligent supervision or selection of the employee, section 2680(h) should be

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146. *See* 108 S. Ct. at 2458 (Kennedy, J., concurring); *see also* 108 S. Ct. at 2460 (O'Connor, J., dissenting).

147. *Id.* at 2458-60.

148. *Id.* at 2459.

149. *Id.*

150. *Id.* at 2460.

151. *Id.*

152. RESTATEMENT (SECOND) OF TORTS § 448 (1965). Section 448 states:

> The act of a third person in committing an intentional tort or crime is a superceding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.*

Id. (emphasis added).

applied to bar the claim. However, where government negligence is independent of the employment relationship between the intentional tortfeasor and the government, section 2680(h) should not be applied to bar the claim and the government should be responsible for its negligence.

Gregg Guthrie